No. 84-786

In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MAINE, PETITIONER

v.

PERLEY MOULTON, JR.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

KATHLEEN A. FELTON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Sixth Amendment prohibits the use at trial of post-indictment incriminating statements made to a government informant, where the statements were made at a meeting arranged by the defendant and where the government recorded the statements as part of an investigation of threats against the informant and other prospective witnesses.

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INTEREST OF THE UNITED STATES

This case presents a significant question concerning the admissibility at trial of post-indictment incriminating statements made by a defendant to a government informant. Although this happens to be a state case, the resolution of the question presented will also affect federal criminal prosecutions.

STATEMENT

After a jury-waived trial in the Superior Court of Waldo County, Maine, respondent was convicted on several counts of theft and burglary. The Supreme Judicial Court of Maine reversed his convictions on the ground that certain post-indictment statements made by respondent to a government informant had been improperly admitted in evidence against him.

1. Respondent and a co-defendant, Gary Colson, were indicted in April 1981 on three felony counts of theft by

receiving two stolen trucks and some automobile parts and a misdemeanor count of theft by receiving a stolen automobile (Pet. App. 2; J.A. 8-11).[1] On November 4, 1982, while these charges were still pending, Colson telephoned Belfast Police Chief Robert Keating and informed him that he had received threatening telephone calls regarding the pending criminal charges.[2] When Colson expressed an interest in telling Chief Keating about the circumstances giving rise to the theft indictments, Chief Keating told him to consult with his attorney before revealing any information about those alleged criminal activities. Pet. App. 44.

On November 6, 1982, Colson and respondent met at the home of an acquaintance and then went to another location in Belfast. At that meeting, respondent told Colson of his idea to kill Gary Elwell, a prosecution witness. Colson was to obtain a car to be used in that undertaking. Pet. App. 9-10, 44; J.A. 25-28, 30-32, 72-76, 95-96.

On November 9 and 10, Colson met with Chief Keating and Officer Rex Kelley of the Maine State Police at the office of Colson's attorney. During that meeting, Colson discussed the thefts with which he had been charged as well as the conversation with respondent on November 6 in which respondent had suggested a plan to kill Elwell. Chief Keating previously had learned that other witnesses, including Elwell, had received threats, and that one witness, Leslie Ducaster, had been threatened in person by respondent. Colson consented to the placement of a recording device on his telephone, and subsequently he recorded three telephone calls that were initiated by respondent.[3] Chief Keating testified at the suppression hearing that he placed the recording device on Colson's telephone because respondent was to call Colson back

[1] Superseding indictments were returned in January 1983 (Pet. App. 4).

[2] Colson testified at the suppression hearing that he contacted Chief Keating because the matter of the threatening telephone calls "had gone too far" (J.A. 26).

[3] Respondent's statements in these three conversations were not introduced at trial.

when plans to eliminate Elwell had been finalized and because Colson himself had been receiving threatening telephone calls. Chief Keating told Colson to act normally and just to be himself in these conversations. Pet. App. 10-11, 45; J.A. 28-29, 32-36, 50, 67, 74-78, 87-90, 97-100.

The three recorded telephone conversations covered a wide variety of subjects, including personal matters such as Colson's work with Amway, the purchase of automobiles, etc. There also was discussion of the charges pending against respondent and Colson, in light of their receipt from their lawyers of written statements obtained from the prosecution in which several witnesses incriminated respondent and Colson. See, *e.g.*, 12/2/82 Tr. 1-8; 12/14/82 Tr. 1-4, 7, 9-15, 16-17.[4] In addition, in the first of the recorded telephone conversations, on November 22, 1982, respondent, in an apparent reference to the plan to do away with a prosecution witness (see J.A. 88), told Colson that he had "come up with a method" and that he wanted to get together with Colson to talk about it after respondent had "work[ed] out the details on it" (11/22/82 Tr. 4). Respondent also referred to statements by several witnesses that they had been threatened (12/2/82 Tr. 4; 12/14/82 Tr. 9). In the last of the recorded telephone conversations, respondent, who was then living in New Hampshire, informed Colson that he was coming to Maine for Christmas weekend and wanted to meet with Colson on the day after Christmas (J.A. 109-112; 12/14/82 Tr. 7-8, 19-21, 23).

Chief Keating and Detective Kelley arranged for Colson to wear a body recorder during the December 26 meeting. Both officers testified at the suppression hearing that the body recorder was intended to protect Colson's safety during the meeting, in the event that respondent might have learned that Colson was cooperating with the police, and to record any information concerning threats to other witnesses. J.A. 37-39, 53-55, 67, 84-85, 87-88. Colson was

[4] "Tr." with an accompanying date refers to the transcript of the recorded conversation between respondent and Colson on that particular date.

instructed in connection with the December 26 meeting to be himself and to converse normally, to discuss the threats if that subject was brought up, but to avoid questioning or drawing information out of respondent (J.A. 55-57, 61-62, 77-78, 87). During the conversation, respondent in fact did bring up the issue of killing Gary Elwell, by means of poison darts or explosives (12/26/82 Tr. 18-21). Those portions of the transcript were not admitted into evidence at trial. There also was considerable discussion of developing false testimony for presentation at trial (*id.* at 13-14, 22, 26, 39-40, 44-45, 67-68, 76-77, 87, 97), although only one portion of that discussion was introduced at trial (J.A. 146-150). In addition, there was some direct discussion of the thefts for which respondent had been indicted, and the transcript of portions of the conversation containing such discussion was introduced at trial. See J.A. 113-151.

2. The trial court denied respondent's motion to suppress his statements to Colson (Pet. App. 43-49). The court recognized that under *Massiah* v. *United States*, 377 U.S. 201 (1964), and *United States* v. *Henry*, 447 U.S. 264 (1980), post-indictment statements made by a defendant without the presence of counsel must be suppressed if they were "deliberately elicited" by the State or if the State created a situation likely to induce the defendant to make incriminating statements (Pet. App. 47-48). But the court concluded in this case that "the State did not deliberately elicit any statements contained in the recordings that relate to the crimes for which [respondent] had already been indicted" and that "the State did not create a situation likely to induce [respondent] to make incriminating statements without the assistance of counsel" (*id.* at 49). In this regard, the court found on the basis of the testimony at the suppression hearing that the State had recorded the conversations "for legitimate purposes not related to the gathering of evidence concerning the crime for which [respondent] had been indicted"—*i.e.*, "in order to gather information concerning the anonymous threats that Mr. Colson had been receiving, to protect

Mr. Colson and to gather information concerning [respondent's] plans to kill Gary Elwell" (Pet. App. 48-49).

3. The Maine Supreme Judicial Court reversed respondent's convictions, holding that his Sixth Amendment rights had been violated (Pet. App. 9-19).[5] It found "ample evidence" to support the trial court's conclusion that the recordings were made for legitimate purposes not related to the gathering of evidence concerning the crime for which respondent had been indicted—*i.e.*, concerns about Colson's safety and about gathering information regarding possible threats to other witnesses (*id.* at 12-13). It also acknowledged the trial court's finding that "Colson was told to try to act like himself, converse normally, and avoid trying to draw information out of [respondent]" (*id.* at 16). Nevertheless, the court held that the statements were inadmissible under *United States* v. *Henry*, 447 U.S. at 274, because, in its view, the police "intentionally created a situation that they knew, or should have known, was likely to result in [respondent's] making incriminating statements during his meeting with Colson" (Pet. App. 18).

SUMMARY OF ARGUMENT

The Supreme Judicial Court of Maine has extended this Court's holdings in *Massiah* v. *United States*, 377 U.S. 201 (1964), and *United States* v. *Henry*, 447 U.S. 264 (1980), to quite different circumstances in which the rationale of those decisions does not apply. *Massiah* and *Henry* concerned measures initiated by the government that were found to constitute the "deliberate elicitation" from the defendant of incriminating statements pertaining to the criminal activities for which he already had been indicted. 377 U.S. at 204, 206; 447 U.S. at 270. See also *Brewer* v. *Williams*, 430 U.S. 387, 399-401

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[5] The Supreme Judicial Court also reversed the trial court's dismissal of several counts on the basis of improper venue (Pet. App. 6-9) and rejected respondent's search and seizure claims (*id.* at 19-41). Those issues are not involved here.

(1977); *id.* at 410, 412 (Powell, J., concurring); *Nix* v. *Williams*, No. 82-1651 (June 11, 1984), slip op. 4, 8. The Sixth Amendment principles articulated in *Massiah* require exclusion of the defendant's statements in such circumstances in order to prevent "overreaching" by the police or prosecutor and to "safeguard the adversary system" (*Nix* v. *Williams*, slip op. 14; *United States* v. *Ash*, 413 U.S. 300, 312 (1973)). The far different circumstances of this case do not activate the same concerns.

Three factors in particular are significant. First, unlike the agents in *Massiah* and *Henry*, the police in this case were not "intentionally creating a situation likely to induce [the defendant] to make incriminating statements without the assistance of counsel" (*Henry*, 447 U.S. at 274). It was *respondent* who initiated each of the telephone conversations and the December 26 meeting and who thereby "created" the situation in which he made the incriminating statements. Second, in *Massiah* and *Henry* the government deliberately sought to obtain statements that were intimately connected with the crimes with which the defendant was charged. In this case, by contrast, the Supreme Judicial Court found "ample evidence" to support the trial court's finding that the police recorded the conversations for legitimate reasons unrelated to the obtaining of statements from respondent pertaining to the charges against him: to protect the safety of Colson and to investigate threats to him and other witnesses. Third, the police in this case had reasonable grounds to believe that respondent was engaged in obstruction of justice by threatening witnesses and that respondent would discuss plans to kill a witness in the conversations he initiated with Colson—factors that were not present in *Massiah* and *Henry*. A defendant has no constitutional right to the assistance of counsel when he is planning or discussing such endeavors.

There is no need for the Court to decide in this case whether any one of the foregoing factors alone would be a sufficient basis on which to distinguish *Massiah*. At least when considered in combination, these factors

strongly support the conclusion that *Massiah* should not be extended to require the exclusion of respondent's statements. There plainly was no "overreaching" by the police in this case. To the contrary, the police acted in an entirely responsible manner based on legitimate and well-founded concerns that respondent was threatening physical harm to witnesses and engaging in efforts to undermine the very adversary system that the Sixth Amendment was intended to preserve.

ARGUMENT

A. THE RATIONALE OF *MASSIAH* DOES NOT APPLY WHERE IT WAS THE DEFENDANT, NOT THE GOVERNMENT, WHO CREATED THE SITUATION IN WHICH HE MADE INCRIMINATING STATEMENTS

The first important distinction between this case and *Massiah* or *Henry* is that in the latter cases it was the government that intentionally contrived a situation in which it was likely that the defendant would make incriminating statements, while in this case it was respondent who initiated each of the recorded telephone conversations and arranged the December 26 meeting (J.A. 25-36, 70, 73, 84-85). The origins, holding, and rationale of *Massiah* and its progeny do not extend to these circumstances.

1. a. In *Massiah*, a government agent instructed the informant to invite Massiah to go for a ride in the informant's car and to induce him to talk about the crimes for which he had been indicted. An agent overheard incriminating statements made by Massiah and testified about them at trial. *United States* v. *Massiah*, 307 F.2d 62, 66 (2d Cir. 1962); *id.* at 72 (Hays, J., dissenting). On the basis of these factual premises, Massiah argued in this Court that the statements he made to the informant should have been excluded because he had been subjected to surreptitious interrogation by the government in violation of his right to counsel. Pet. Br. at 4, 6-10, *Massiah* v. *United States*. This Court agreed, but it is clear that

the Court rested its holding, as Massiah had rested his argument, on the fact that it was the government that set up the encounter and thereby induced him to talk. The Court's explicit holding in *Massiah* was that "the petitioner was denied the basic protections [of the Sixth Amendment guarantee] when there was used against him at his trial evidence of his own incriminating words, which federal agents had *deliberately elicited* from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206 (emphasis added); see also *id.* at 204. The word "elicit" connotes an affirmative drawing out of information that the defendant would not otherwise be disposed to reveal.[6]

Moreover, the Court in *Massiah* relied on the concurring opinions of four Justices in *Spano* v. *New York*, 360 U.S. 315, 324-327 (1959), a case that involved protracted in-custody interrogation of the defendant without the presence of counsel. The Court described the rationale of the concurrences in *Spano* to be that reversal is required whenever a confession is "deliberately elicited" from the accused after indictment and without the presence of counsel, because a Constitution that guarantees a defendant the right to counsel at a formal trial "could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding." 377 U.S. at 204. The Court acknowledged that "in the *Spano* case the defendant was interrogated in a police station, while [in *Massiah*] the damaging testimony was elicited from the defendant without his knowledge while he was free on bail." *Id.* at 206. But the Court concluded that if the rule drawn from *Spano* "is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon * * * because he did not even know that he was under interrogation by a government agent." *Ibid.*, quoting 307 F.2d at 72-73 (Hays, J., dissenting).

[6] *Webster's Third New International Dictionary* 736 (4th ed. 1976) defines "elicit" to mean "to draw or bring out (something latent or potential), * * * to call forth or draw out." The *Oxford English Dictionary* 89 (1978) similarly defines "elicit" to mean "[t]o draw forth (what is latent or potential) into sensible existence, * * * to extract, draw out (information) *from* a person by interrogation" (emphasis in original).

Thus, the rationale of *Massiah* was that, as in *Spano*, the government had set up what amounted to an "extrajudicial proceeding" at which the defendant would be interrogated, thereby circumventing the formal trial proceedings and the constitutional guarantees that would apply in such proceedings. 377 U.S. at 204.[7] The finding of a right to counsel in such circumstances, the Court explained, simply reaffirmed the principle of *Powell* v. *Alabama*, 287 U.S. 45, 57 (1932), that a defendant is entitled to the aid of counsel during the critical period of the "proceedings" against him. 377 U.S. at 205.

b. This view of the basis and limits of *Massiah* is reflected in the Court's subsequent opinions as well. Thus, in *Brewer* v. *Williams* the Court described the rule of *Massiah* to be that "once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." 430 U.S. at 401. The Court in *Brewer* found a Sixth Amendment violation under *Massiah* because the detective "deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him." 430 U.S. at 399. See *id.* at 400 ("no such constitutional protection would have come into play if there had been no interrogation"). The concurring opinions in *Brewer* echo this same theme that the government in that case

[7] See *Spano*, 360 U.S. at 325 (Douglas, J., concurring) ("[t]his is a case of an accused, who is scheduled to be tried by a judge and jury, being tried in a preliminary way by the police"); *id.* at 326 ("secret trial"); *id.* at 327 (Stewart, J., concurring) (after indictment, accused has right to counsel at every stage of "proceedings"; "[w]hat followed the petitioner's surrender in this case was not arraignment in a court of law, but an all-night inquisition in a prosecutor's office, a police station, and an automobile").

had imposed upon the defendant by means of interrogation.[8]

Similarly, in *United States* v. *Henry*, the Court stated that the question presented was whether, under the particular facts of that case, "a Government agent 'deliberately elicited' incriminating statements from Henry within the meaning of *Massiah*." 447 U.S. at 270. See also *id.* at 272, 273. In concluding that the agent did so, the Court relied on several factors: that the cellmate was acting under instructions as a paid government informant who was "charged with the task of obtaining information from [the] accused" (*id.* at 270, 272 n.10); that the informant ostensibly was no more than a fellow inmate (*id.* at 270, 273); and that the defendant was in custody at the time (*id.* at 273-274). The Court found these circumstances sufficient to support the conclusion that the informant "deliberately used his position to secure incriminating information from Henry when counsel was not present" and that this conduct was properly "attributable to the Government" (*id.* at 270). Accordingly, the Court held that the government violated the defendant's Sixth Amendment right "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel" (*id.* at 274). Thus, the Court viewed *Henry*, like *Massiah*, as a case in which the government was the moving force in the encounter and therefore could fairly be regarded as having caused the incriminating statements to be made.[9] See also 447 U.S. at 277 (Powell, J., concurring) ("the government engaged in conduct that, considering all of the circumstances, is the functional equivalent of interrogation").

[8] See 430 U.S. at 409 (Marshall, J., concurring) (defendant is entitled to have the "protective shield" of a lawyer between himself and the "awesome power" of the state); *id.* at 411 (Powell, J., concurring) (detective "initiated" conversation); *id.* at 410, 411, 412 (detective engaged in "interrogation"); *id.* at 415 (Stevens, J., concurring) (encounter was "a critical stage of the proceeding" at which a lawyer would have been "the essential medium through which the demands and commitments of the sovereign [could have been] communicated to the citizen").

[9] The Court did observe in *Henry* that "[i]n *Massiah*, no inquiry was made as to whether Massiah or his codefendant first raised the subject of the crime under investigation." 447 U.S. at 271-272. However, that observation reflected only a determination by the Court not to parse the dynamics of the interaction between the defendant and the informant within the context of a conversation for which the Court held that the government must bear overall responsibility. The incriminating statements concededly were "the product of this conversation" (*id.* at 271). Here, by contrast, there was no governmental contrivance to secure information from respondent, and it was he who provided the impetus behind each of the recorded telephone conversations and the December 26 meeting. The Court in *Henry* did not suggest that it was irrelevant whether the government or the defendant initiated the overall encounter. To the contrary, as we have explained in the text, the Court's holding was explicitly premised on the finding that the government intentionally created a situation that was likely to induce the defendant to make incriminating statements (*id.* at 274).

Moreover, in a footnote elaborating upon the sentence quoted above, the Court explained that although the government specifically arranged the meeting in *Massiah*, in *Henry* the government was "fortunate enough to have an undercover informant already in close proximity to the accused," and the government exploited that situation by charging the informant with obtaining information from the accused (*id.* at 272 n.10). It was this exploitation that in turn caused the defendant to confide in the informant (*id.* at 271, 274 & n.12). Thus, the explanatory footnote confirms that the quoted passage was not intended to make the fact of governmental instigation irrelevant.

2. The conclusion that the rationale of *Massiah* applies only to circumstances in which the government takes affirmative steps to induce the defendant to make incriminating statements also is supported by the text of the Sixth Amendment guarantee and by this Court's decisions construing that guarantee in other contexts.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." The term "defence" itself connotes a situation in which the government takes the offensive as an aspect of the "prosecution" of the accused, in the same manner as the gov-

ernment does at the trial itself, not a situation in which the accused himself takes the initiative in bringing about a pre-trial conversation or meeting with a person he does not even know to be a government informant. Cf. *Ross* v. *Moffitt*, 417 U.S. 600, 610-611 (1974). This Court's decisions reinforce that conclusion.

The Court has recognized that the "core purpose" of the counsel guarantee is to assure assistance at trial, " 'when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.' " *United States* v. *Gouveia*, No. 83-128 (May 29, 1984), slip op. 8, quoting *United States* v. *Ash*, 413 U.S. 300, 309 (1973). The Sixth Amendment

> embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill *to protect himself when brought before a tribunal with power to take his life or liberty*, wherein the prosecution is presented by experienced and learned counsel.

United States v. *Gouveia*, slip op. 8, quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463 (1938) (emphasis added).

The Court also has "extended an accused's right to counsel to certain 'critical' pretrial proceedings" (*Gouveia*, slip op. 8). These additional situations to which the counsel guarantee attaches are "trial-like confrontation[s]" between the government and the accused (*Ash*, 413 U.S. at 314) that "might appropriately be considered to be parts of the trial itself" (*id.* at 310). In *United States* v. *Wade*, 388 U.S. 218, 224 (1967), the Court explained the rationale and process by which the counsel guarantee has been expanded to these additional confrontations:

> When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings.

Accord, *Ash*, 413 U.S. at 310-311. "The Court consistently has applied a historical interpretation of the guarantee, and has expanded the constitutional right to counsel only when new contexts appear presenting the same dangers that gave birth initially to the right itself." *Id.* at 311. See, *e.g.*, *United States* v. *Wade*, *supra* (lineup); *Coleman* v. *Alabama*, 399 U.S. 1 (1970) (preliminary hearing); *White* v. *Maryland*, 373 U.S. 59 (1963) (guilty plea at preliminary hearing).

The Court's explanation of the holding in *Massiah* is rooted in these Sixth Amendment principles. In *Ash* the Court described *Massiah* as involving one such "trial-like" situation, in which "the accused was confronted by prosecuting authorities who obtained, by ruse and in the absence of defense counsel, incriminating statements" (413 U.S. at 311, 312), and the Court explained that if counsel had been present at the confrontation of Massiah by the government, he "could have advised his client on the benefits of the Fifth Amendment and could have sheltered him from the overreaching of the prosecution" (*id.* at 312). Indeed, as explained above (see page 8, *supra*), the Court in *Massiah* itself regarded the encounter between Massiah and the informant to be identical for Sixth Amendment purposes to the interrogation in *Spano*, which the Court characterized as an "extrajudicial proceeding" that was, in practical effect, a substitute for the trial itself. 377 U.S. at 204. See also *Henry*, 447 U.S. at 269 (the Court must scrutinize "postindictment confrontations" to determine whether they are "critical stages" of the prosecution). Most recently, in *Nix* v. *Williams*—which concerned the same interrogation that was found in *Brewer* v. *Williams* to constitute a violation of the Sixth Amendment under *Massiah*—the Court, as in *Ash*, described the problem addressed by *Massiah* to be one of

"overreaching" by the police (*Nix* v. *Williams*, slip op. 14). And the Court in *Nix* stated the underlying Sixth Amendment rule to be that the "assistance of counsel must be available at pretrial confrontations where 'the subsequent trial [cannot] cure a[n otherwise] one-sided confrontation between prosecuting authorities and the uncounseled defendant.'" *Ibid.*, quoting *Ash*, 413 U.S. at 315 (brackets in *Nix*).

The history and logic of the Court's extension of the Sixth Amendment guarantee just described do not apply where, as in this case, the defendant initiates an encounter with an undercover informant. In that circumstance, the defendant is not "imposed upon" by the government (*Massiah*, 377 U.S. at 206) and is not "brought before" a "tribunal" by the government (*Johnson* v. *Zerbst*, 304 U.S. at 463). Nor is he brought before an "extrajudicial proceeding" that is the functional equivalent of such a tribunal, as in the case of government-instigated interrogation or comparable elicitation of incriminating statements (*Massiah*, 377 U.S. at 204), in which the confrontation "might appropriately be considered to be part[] of the trial itself" (*Ash*, 413 U.S. at 310). By the same token, the government's willingness to have an undercover informant attend a meeting suggested by the defendant does not in any way approach the sort of "overreaching" by the government or "one-sided confrontation between prosecuting authorities and the uncounseled defendant" that led the Court to extend the right to counsel to the situations presented in *Massiah* and *Brewer*. See *Nix* v. *Williams*, slip op. 14; *Ash*, 413 U.S. at 312.[10] To the contrary, such participation by the informant may often be necessary in order to maintain his undercover status. See *Weatherford* v. *Bursey*, 429 U.S. 545, 557-558 (1977). In short, this Court's opinions do not support an extension of the Sixth Amendment right to counsel to a situation involving statements freely

[10] See Kamisar, Brewer v. Williams, Massiah *and* Miranda: *What is "Interrogation"? When Does it Matter?*, 67 Geo. L. J. 1, 44 n.286 (1978) (a "forceful argument" can be made that *Massiah* "does not reach so far").

made by the defendant after he approached the government informant. Cf. *United States* v. *Melanson*, 691 F.2d 579, 585 (1st Cir.), cert. denied, 454 U.S. 856 (1981). Accordingly, to hold that this case is controlled by *Massiah* would cut that case's exclusionary rule loose from its moorings in settled Sixth Amendment principles.

3. There is an additional reason why *Massiah* should not be extended to require the exclusion of statements where the defendant, uninfluenced by any governmental contrivance, proposed the meeting with the government informant. A showing that the government "deliberately elicited" the admissions or other incriminating statements from the defendant is an appropriate requirement because exclusion of such highly relevant evidence at trial can be justified only where there is a substantial basis for believing that government conduct actually *caused* the defendant to make uncounseled statements that he otherwise would not have been disposed to make (cf. *United States* v. *Russell*, 411 U.S. 423 (1973))—*i.e.*, that the statements are fairly "attributable to the Government" (*Henry*, 447 U.S. at 270). For this reason, the Court in *Henry* was careful to distinguish the situation involving only a "listening post," such as where conversations between the accused and a third party are overheard by means of a recording device installed by the government. 447 U.S. at 271 n.9. See, *e.g.*, *United States* v. *Hearst*, 563 F.2d 1331, 1347-1348 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978). Similarly, Justice Powell explained in his concurring opinion, citing *Hearst*, that "*Massiah* does not prohibit the introduction of spontaneous statements that are not elicited by governmental action." 447 U.S. at 276.

Although this case is factually different from *Hearst* in the sense that Colson, the informant, was not a passive listener in the meeting with respondent, here, as in *Hearst*, the government itself did not create the situation in which it was likely that respondent would make incriminating statements. Respondent did that himself by initiating each telephone conversation and setting up the December 26 meeting with Colson. This case and *Hearst*

therefore are directly analogous for purposes of application of the *Massiah* doctrine. Compare *United States* v. *Panza*, 750 F.2d 1141, 1153 (2d Cir. 1984) ("the conversation was not attributable to the government and did not violate [the defendant's] Sixth Amendment rights").[11]

By contrast, in *Massiah* it was clear that the government's actions in arranging the meeting *did* cause the defendant to make the incriminating statements, and in *Henry* the Court viewed the circumstances in the limited record as sufficient to support a similar conclusion. In those circumstances, exclusion of the statements that were the product of the government's deliberate interference with the attorney-client relationship was required, despite the substantial societal cost, in order to restore fairness to the trial proceedings. See *United States* v. *Morrison*, 449 U.S. 361, 364-365 (1981); cf. *Nix* v. *Williams*, slip op. 14. But absent unusual circumstances not present here, where the defendant approaches the informant and requests the meeting, not only is there no comparable affirmative conduct by the government to *create* the situation in which the incriminating statements are made; there often will not be a firm basis for believing that whatever involvement there was by the government —here, its agreement to have the informant participate in the meeting under instructions to act and converse normally—actually had any effect on what the defendant said.

In this case, for example, there is no indication that the fact that Colson had approached the government and agreed to become an informant after he received threats had any effect on respondent's evident eagerness to discuss the charges against him in the December 26 meeting with Colson that respondent initiated. Nor, as a result, is there any indication that this encounter had any adverse impact on the fairness of respondent's trial. Compare *United States* v. *Morrison*, *supra*. It is clear that if Colson had not become a government informant until after December 26, there could be no basis whatever for finding a Sixth Amendment violation in the use at trial of statements respondent made to him on that date. If, as seems likely, Colson's status as an informant at the time of the meeting had no substantial effect on what respondent was disposed to say, exclusion of respondent's statements unfairly places the government in a *worse* position by virtue of Colson's cooperation than if Colson had not approached the police until after the conversations. Cf. *Nix* v. *Williams*, slip op. 10, 14. The Sixth Amendment does not require that result.[12]

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[11] *Panza* involved the closely related situation in which a question arises as to whether the person who engaged in conversation with the defendant should be regarded as a government agent in the particular circumstances presented. See, *e.g.*, *Thomas* v. *Cox*, 708 F.2d 132, 135-136 (4th Cir.), cert. denied, 464 U.S. 918 (1983); *United States* v. *Malik*, 680 F.2d 1162, 1164-1165 (7th Cir. 1982). If not, the conversation and any incriminating statements emanating from it are not appropriately attributable to the government for Sixth Amendment purposes.

[12] In *Beatty* v. *United States*, 389 U.S. 45 (1967), the Court, citing *Massiah*, summarily reversed a conviction where the meeting at which the incriminating statements were made to the undercover informant was requested by the defendant. However, the Court's summary disposition in *Beatty*, without an opinion, does not have the same precedential effect as a case briefed and argued on the merits. *Edelman* v. *Jordan*, 415 U.S. 651, 670-671 (1974). See *Snead* v. *Stringer*, 454 U.S. 988, 994 n.3 (1981) (Rehnquist, J., dissenting from denial of certiorari) (discussing *Beatty*); *id.* at 993 (*Massiah*, *Brewer*, and *Henry* support requirement that defendant show "functional equivalent of interrogation"). In any event, *Beatty* has not been relied upon or even cited in any subsequent opinions for the Court, and we do not believe that *Beatty* should be followed, because its result fails to withstand analysis. But see *Mealer* v. *Jones*, 741 F.2d 1451, 1454 (2d Cir. 1984), cert. denied, No. 84-6210 (Apr. 1, 1985); *United States* v. *Muzychka*, 725 F.2d 1061, 1063 (3d Cir. 1984), cert. denied, No. 83-1714 (May 21, 1984).

For the reasons given in the text (see page 7-8, *supra*), because the government does not "elicit" statements from the defendant when the defendant himself requests the meeting at which the statements are made, *Beatty* constituted a considerable extension of *Massiah*. Moreover, any inference from the facts in *Beatty* that the Court was prepared to extend *Massiah* in full measure to the mere acquisition of statements from the defendant without government provocation did not survive *Brewer* v. *Williams*, where the Court stated that no Sixth Amendment violation would have

B. *MASSIAH* DOES NOT REQUIRE EXCLUSION OF THE DEFENDANT'S STATEMENTS WHERE THE GOVERNMENT'S ACTIONS WERE UNDERTAKEN FOR LEGITIMATE PURPOSES UNRELATED TO OBTAINING EVIDENCE CONCERNING THE CRIME WITH WHICH THE DEFENDANT WAS CHARGED

This case is distinguishable from *Massiah* and *Henry* not only because here the defendant initiated the contact,

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occurred if the government had not engaged in interrogation or its functional equivalent. 430 U.S. at 399-401; *id.* at 410, 412 (Powell, J., concurring). Similarly, in finding no Sixth Amendment violation in *Weatherford* v. *Bursey, supra*, the Court stressed that the defendant had invited the informant to the meeting and that it was necessary for him to accept the invitation in order to avoid suspicion that he was an informant. 429 U.S. at 557-558.

In *Henry*, the Fourth Circuit expressly relied on *Beatty* for the proposition that *Massiah* was not limited to circumstances in which the government induced the statements in question (*Henry* v. *United States*, 590 F.2d 544, 546 (1978)), and Henry argued in this Court (Resp. Br. at 19, 21-25, 34 n.12, *United States* v. *Henry*) that *Beatty* required the exclusion of all incriminating statements obtained by the government, even if they were not induced by it. This Court, however, did not rely on *Beatty* or even cite it, nor did it in any way endorse the view that it is irrelevant whether the defendant or the government was the moving force behind the encounter. To the contrary, the Court found a Sixth Amendment violation because the government had "intentionally creat[ed]" a situation in which it was likely that the defendant would incriminate himself. 447 U.S. at 274.

The Fourth Circuit and the respondent in *Henry* also relied on the Court's summary reversal in *McLeod* v. *Ohio*, 381 U.S. 356 (1965), for the proposition that the absence of inducement by the government is irrelevant. In *McLeod*, however, the defendant made the statements to police officers while riding in a car with them; the statements were not made to an undercover informant. Moreover, the state court opinion under review does not disclose how the defendant came to make the statements; the opinion instead focuses primarily on whether the accused had a right to counsel during the period after indictment but before appointment of counsel. *State* v. *McLeod*, 1 Ohio St. 2d, 60, 62-63, 203 N.E. 2d 349, 351-352 (1964). In any event, this Court since has understood *McLeod* as a case involving elicitation of statements by the government. See *Edwards* v. *Arizona*, 451 U.S. 477, 484 n.8 (1981). See also *Wyrick* v. *Fields*, 459 U.S. 42, 54 (1982) (Marshall, J., dissenting)

but also because the reasons for the government's response to that contact were quite different from the purposes underlying the government's actions in *Massiah* and *Henry*. In *Massiah*, the government had "instructed" the informant "to engage Massiah in conversation relating to the alleged crimes" (307 F.2d at 72 (Hays, J., dissenting); Pet. Br. at 4, *Massiah* v. *United States*), and in *Henry* the Court concluded that the government agent had likewise instructed the informant to obtain incriminating information from the accused that specifically related to the very crime with which he was charged (447 U.S. at 270-271 & nn. 7-8, 272 n.10). In this case, by contrast, the trial court found that the State recorded the conversations "for legitimate purposes *not related* to the gathering of evidence concerning the crime for which [respondent] had been indicted"—namely, "to gather information concerning the anonymous threats that Mr. Colson had been receiving, to protect Mr. Colson and to gather information concerning [respondent's] plans to kill Gary Elwell." Pet. App. 48-49 (emphasis added). Cf. *New York* v. *Quarles*, No. 82-1213 (June 12, 1984). The Supreme Judicial Court found "ample evidence" to support that finding (Pet. App. 13). This distinction is significant for several reasons.

1. The principal concern underlying *Massiah* and its progeny is that the government might engage in secret interrogation of the defendant for the very purpose of circumventing the formal trial proceedings and the assistance of counsel that the defendant would have in such proceedings. See pages 8-11, *supra*. Thus, in *Massiah* itself, the petitioner argued that the government "must deal through and not around an attorney retained by a defendant under indictment." Pet. Br. at 6, quoting 307 F.2d at 72 (Hays, J., dissenting). In *Brewer*, this concern that the government might act in deliberate derogation of defense counsel's role was heightened because it

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(*McLeod* holds that "the Sixth Amendment forbids *all* efforts to elicit information * * * in the absence of counsel, * * * regardless of whether the technique used to *extract* information is in any way coercive" (second emphasis added)).

was found that the police violated an express agreement with counsel that the defendant would not be questioned during the ride to Des Moines. 430 U.S. at 390-391, 401 n.8; *id.* at 410, 412 n.1, 414 n.2 (Powell, J., concurring); *id.* at 415 (Stevens, J., concurring).[13] And in *Henry* the Court similarly concluded that the government agent had "planned an impermissible interference with the right to the assistance of counsel." 447 U.S. at 275.[14] Compare *Estelle* v. *Smith*, 451 U.S. 454, 470-471 (1981).

The Court consistently has stated the rule of *Massiah* in terms that respond to and seek to prevent the type of governmental conduct just described. Thus, in *Massiah*, the Court held that the Sixth Amendment was violated because there was used against the defendant at trial evidence of his own incriminating words "which federal agents had *deliberately elicited* from him after he had been indicted and in the absence of his counsel" (377 U.S. at 206 (emphasis added)). Similarly in *Brewer* v. *Williams* the Court premised the finding of a violation on the fact that the detective had "deliberately and designedly set out to elicit information from Williams" (430 U.S. at 399), and in *Henry* the Court concluded that the government violated the Sixth Amendment because it "intentionally creat[ed]" a situation likely to induce the defendant to make incriminating statements (447 U.S. at 274).[15]

[13] See also 430 U.S. at 407 (Marshall, J., concurring) ("there can be no doubt that Detective Leaming consciously and knowingly set out to violate Williams' Sixth Amendment right to counsel"); *Nix* v. *Williams*, slip op. 4-5 (Stevens, J., concurring).

[14] See also 447 U.S. at 275 n.14, quoting Disciplinary Rule 7-104(A)(1) of the American Bar Association's Code of Professional Responsibility ("a lawyer shall not * * * [c]ommunicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter"). The Court's citation to this rule suggests that it viewed the Sixth Amendment issue in terms of a deliberate circumvention of counsel with regard to the "subject of the representation."

[15] Compare *Weatherford* v. *Bursey*, 429 U.S. at 558, in which the Court held that there was no Sixth Amendment violation because, inter alia, there was no "purposeful intrusion" by the government into the lawyer-client relationship.

The exclusionary rule announced in *Massiah* thus "serves the salutary purpose of preventing police interference with the relationship between a suspect and his counsel once formal proceedings have been initiated." *Henry*, 447 U.S. at 276 (Powell, J., concurring). But the language, origins, and function of the *Massiah* rule do not require the exclusion of statements that were obtained as the result of governmental actions that were not undertaken for the purpose of gathering information about the crimes for which the defendant had been indicted, but rather had an objectively justifiable independent purpose. The concurrent finding by the courts below that the State recorded the conversations for reasons unrelated to obtaining incriminating statements from respondents about the pending charges therefore removes this case from the ambit of the *Massiah* doctrine.

2. a. Other considerations support this conclusion as well. The fact that a person is under indictment for one crime obviously does not prevent the government from investigating other criminal activity in which he has been implicated. As part of such an investigation, an undercover informant may elicit from him incriminating statements pertaining to other criminal activity as to which charges have not been filed. And if formal charges subsequently *are* filed against the defendant arising out of the latter activity, *Massiah* does not prohibit the introduction of the previously elicited statements at the defendant's trial on those charges. See, *e.g.*, *Hoffa* v. *United States*, 385 U.S. 293, 307-308 (1966); *Mealer* v. *Jones*, 741 F.2d at 1453; *United States* v. *Lisenby*, 716 F.2d 1355, 1357-1359 (11th Cir. 1983) (en banc); *United States* v. *Moschiano*, 695 F.2d 236, 240-241 (7th Cir. 1982), cert. denied, 464 U.S. 831 (1983); *United States* v. *Calhoun*, 669 F.2d 923, 925 (4th Cir.), cert. denied, 456 U.S. 946 (1982); *United States* v. *Missler*, 414 F.2d 1293, 1302-1303 (4th Cir. 1969), cert. denied, 397 U.S. 913 (1970). Although in such circumstances the statements may have been intentionally obtained from the defendant at a time when he had a Sixth Amendment right to counsel with regard to the then-pending charges, the

elicitation of the statements in connection with the investigation of a separate crime does not constitute the sort of direct governmental interference with the attorney-client relationship that constitutes a violation of the *Massiah* rule. Put another way, *Massiah* does not confer on a defendant against whom an indictment has been returned an immunity from normal law enforcement techniques to investigate indications of other criminal activity.[16]

For the foregoing reasons, it is clear that if respondent had been charged with obstruction of justice, *Massiah* and its progeny would not bar the admission at his trial on those charges of any incriminating statements recorded by the State while he was under indictment only for the theft offenses. Contrary to the holding of the Maine Supreme Judicial Court, we submit that the Sixth Amendment likewise does not require exclusion of any such incriminating statements from evidence at respondent's trial on the theft charges. When the officers received information that Colson and various prosecution witnesses were being threatened, and that respondent had propounded a plan to kill one of the witnesses, they unquestionably would have been derelict in their duty had they failed to pursue an inquiry into these matters by all proper investigative means at hand. Such means would include undercover contact with respondent in an effort to secure further information about, and to forestall consummation of, any proposed new offenses. Information uncovered in such an objectively justified investigation directed against independent offenses by respondent should

[16] To the extent it governs law enforcement techniques, the Disciplinary Rule for attorneys cited by the Court in *Henry* (see note 14, *supra*) likewise does not prohibit communications between an informant and the defendant with regard to suspected criminal activity for which he had not been formally charged. See, *e.g.*, *United States* v. *Fitterer*, 710 F.2d 1328, 1333 (8th Cir.), cert. denied, 464 U.S. 852 (1983); *United States* v. *Kenny*, 645 F.2d 1323, 1339 (9th Cir.), cert. denied, 454 U.S. 828 (1981); *United States* v. *Vasquez*, 675 F.2d 16, 17 (2d Cir. 1982); but cf. *United States* v. *Jamil*, 707 F.2d 638, 646 (2d Cir. 1983).

not be excluded if relevant to the trial of charges pending at the time of the investigation.

We recognize that there is language in *Massiah* that could be read to support a contrary result, but there are material differences between that case and this one that counsel against an overbroad reading of *Massiah* in this regard. The government argued that the incriminating statements at issue in *Massiah* should not be suppressed because federal law enforcement agents had an interest in continuing their investigation of Massiah and his associates in order to find out the source and intended buyer of the narcotics and to uncover the full scope of the well-organized drug ring in which petitioner appeared to be involved. 377 U.S. at 206. The Court was prepared to assume that it was entirely proper for the government to continue that investigation (*id.* at 206-207), but it nevertheless held that "the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial" (*id.* at 207 (emphasis in original)). This passage in the *Massiah* opinion does not require exclusion of respondent's incriminating statements in this case.

Massiah had been indicted in connection with the importation of cocaine. 377 U.S. at 202. Although the government had an obvious interest in continuing its investigation (especially in order to detect the activities of other persons who had not yet been charged), insofar as Massiah himself was concerned, any such investigation of the narcotics ring necessarily pertained directly to the criminal activities for which he already had been indicted. Moreover, the Court's specific holding, quoted above, was that Massiah's statements "obtained by federal agents under the circumstances here disclosed" were inadmissible against him; the circumstances disclosed were that the informant had been specifically instructed to obtain information from Massiah about the alleged crimes. See page 7, *supra*.

The government's argument in *Massiah* to which the passage in question responds had the flavor of a post hoc

rationalization of conduct that, at its inception, in fact had as a primary purpose the obtaining of evidence for use at trial on the pending charges. If the Court in *Massiah* had fashioned an exception permitting the admission of Massiah's statements on the basis of the government's assertion that it had a general ongoing interest in investigating related offenses, that exception might well have swallowed the rule the Court fashioned to prevent intentional interference with the attorney-client relationship concerning the crimes with which the defendant is already charged. But where, as here, the investigation was undertaken for reasons entirely distinct from any desire to procure incriminating statements from the defendant concerning the crimes with which he already has been charged, the question is not one of fashioning an "exception" to the *Massiah* rule. The rule itself simply does not apply. And whatever difficulty there might be in some cases in teasing out the motives for governmental action, the record in this case unequivocally demonstrates an objective basis on which it can be determined that the governmental action was not a subterfuge to circumvent the policies of the *Massiah* rule, and both courts below so found (Pet. App. 12-13, 48-49).[17]

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[17] The Supreme Judicial Court characterized the trial court's finding that the recordings were made for legitimate purposes as focusing on the "motives" of the police. See Pet. App. 12, 14. The court acknowledged that this "legitimate motive" was relevant to the alleged infringement of respondent's right to counsel, but did not find it dispositive. *Id.* at 14. Perhaps some inquiry into subjective motivation is inevitable, given the problem of intentional interference to which the *Massiah* rule is addressed and the resulting emphasis in the test on whether a "deliberate" elicitation occurred. However, there is no need here to consider the relative roles of a subjective and objective inquiry into the purpose of the police endeavor, because by either measure there is "ample evidence" to support the conclusion that the recordings had a legitimate basis independent of any desire to obtain incriminating statements about the thefts (Pet. App. 12-13). Compare *New York* v. *Quarles*, No. 82-1213 (June 12, 1984), slip op. 6.

The Supreme Judicial Court believed that a different result was required because it was foreseeable to the Belfast Police that respondent would make incriminating statements pertaining to the thefts in the course of the December 26 meeting. See Pet. App. 15-16. Foreseeability, however, is not the test. The government must have "intentionally creat[ed]" the situation in which the defendant was induced to make incriminating statements. *Henry*, 447 U.S. at 274. As we have shown in Point A, it was respondent, not the State, who created the situation here. And as we have explained in this Point B, the State's investigation did not in any event have the focused purpose of eliciting statements about the pending charges. Thus, even if Chief Keating should have anticipated that respondent would discuss the theft charges, the relevant question would be whether the State recorded the statements *because of*, rather than *in spite of*, that consequence. *Cf. Wayte* v. *United States*, No. 83-1292 (Mar. 19, 1985), slip op. 11. The courts below found that it did not.

In sum, a "separate crimes" doctrine draws support from the principles of *Massiah*, establishes a clear and objective test, and accomplishes an appropriate accommodation of the defendant's interest in protecting his relationship with his attorney against interference by the government and society's countervailing interest in the investigation of crime and the safety of its citizens.

b. In accordance with the principles just discussed, a number of courts of appeals have held that *Massiah* does not apply in cases involving investigations of separate crimes. In *Grieco* v. *Meachum*, 533 F.2d 713, 717-718 (1st Cir.), cert. denied, 429 U.S. 858 (1976), the First Circuit held that statements by the defendant, who was under indictment for murder, offering to pay a jail-house informant $50,000 to confess to the murder were properly admitted at the murder trial, apparently as admissions tending to show the defendant's consciousness of guilt for the murder (*id.* at 717). The court reasoned that exclusion of relevant, otherwise admissible testimony is a remedy for a past violation of the Constitution and that there was no violation of the defendant's constitutional rights in obtaining the defendant's statements concerning a separate crime, subornation of perjury (*id.* at 717-718). The court stressed, however, that the government in that case had "acted in good faith in investigating another

crime" and that the result might have been different if the government's actual intention had been to obtain testimony for use in the murder trial (*id.* at 718). In the latter event, of course, the ostensibly independent investigation would have been a pretext for a direct intrusion into the attorney-client relationship concerning the murder charges and thus a "deliberate elicitation" of incriminating statements about those charges within the meaning of *Massiah*. Accord, *United States* v. *DeWolf*, 696 F.2d 1, 2-3 (1st Cir. 1982).

The Seventh, Ninth, and Eleventh Circuits have followed the First Circuit's decision in *Grieco* and concluded that *Massiah* is inapplicable in such circumstances. See *United States* v. *Merritts*, 527 F.2d 713, 715-716 (7th Cir. 1975); *United States* v. *Moschiano*, 695 F.2d 236, 240-243 (7th Cir. 1982), cert. denied, 464 U.S. 831 (1983)[18]; *United States* v. *Taxe*, 540 F.2d 961, 968-969 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977); *United States* v. *Darwin*, No. 82-5794 (11th Cir. Apr. 16, 1985), slip op. 3002-3005. But see *Mealer* v. *Jones*, 741 F.2d at 1453-1455. The Eleventh Circuit explained that permitting the use of the statements obtained in the separate investigation will protect the "societal interest in law enforcement," while "[b]arring use of the evidence where there is bad faith or pretext will tend to inhibit the government from overreaching and from doing indirectly what *Massiah* prohibits it from doing directly." *United States* v. *Darwin*, slip op. 3004-3005.

For the most part, the statements admitted into evidence in the cases just discussed related directly to the separate crime that was the subject of investigation, not the original offense with which the defendant was charged. But see *United States* v. *Darwin*, slip op. 3001-3002. In this case, on the other hand, the particular

[18] The Seventh Circuit in *Moschiano* specifically rejected the contention that *Grieco* was effectively overruled by *Henry*, observing that *Henry* "did not address the issue whether post-indictment statements relating to new criminal activity could be used to prove the charges in the pending indictment." 695 F.2d at 242 n.8.

statements introduced at respondent's trial related to the theft offenses themselves. J.A. 113-152.[19] But contrary to dicta in several of the opinions just discussed, that distinction is not significant for purposes of the *Massiah* doctrine.

It is of course true that statements relating to the present or future commission of a crime are not protected by any constitutional or other privilege. For that reason alone, *Massiah* does not preclude their admission into evidence at the trial on the original offense. See page 28, *infra*.[20] While this factor is therefore a sufficient condition for admission of statements obtained in the course of investigating other offenses by the defendant, it is not a necessary one. Application of the *Massiah* exclusionary rule turns on the basis for and purpose of the investigation, not the nature of the evidence it yields. Where, as here, the State engaged in a bona fide investigation into matters independent of the crimes with which the defendant was charged, all evidence obtained through that investigation should be regarded for present purposes as having lawfully come into the State's hands. Such evidence then may be used in any proceeding in which it is relevant. Thus, in this case, because the State properly recorded the December 26 meeting between respondent and Colson as part of an independent investigation into efforts to obstruct justice, *Massiah* did not require the exclusion at the theft trial of respondent's incriminating statements that were recorded in that investigation, whether or not those statements also constituted or referred to separate crimes.

[19] One portion of the transcript did touch upon the subject of producing false testimony at trial (see J.A. 146-150).

[20] In the present case, for example, evidence of respondent's plans to eliminate government witnesses, or to produce false testimony at trial, presumably would have been admissible at respondent's trial on the theft charges to show consciousness of guilt. See, *e.g.*, *United States* v. *DeWolf*, 696 F.2d at 3; *Grieco* v. *Meachum*, 533 F.2d at 717.

C. BECAUSE THERE IS NO RIGHT TO THE ASSISTANCE OF COUNSEL IN CONNECTION WITH OBSTRUCTION OF JUSTICE, THE *MASSIAH* EXCLUSIONARY RULE SHOULD NOT APPLY TO FRUITS OF AN OBJECTIVELY JUSTIFIABLE INVESTIGATION OF SUCH ACTIVITIES

In this case, the Belfast Police not only were conducting a legitimate independent investigation into past threats made to potential prosecution witnesses, but they also had reason to believe that there would be discussions at the December 26 meeting of plans for further obstruction of justice by means of threats or harm to witnesses.[21] Such aggravating circumstances were wholly absent in *Massiah* and *Henry*.

A person has no right to the assistance of counsel in the commission or planning of a crime. *United States* v. *Darwin*, slip op. 3005; *United States* v. *Merritts*, 527 F.2d at 716. As this Court remarked with regard to the attorney-client evidentiary privilege (*Clark* v. *United States*, 289 U.S. 1, 15 (1933)):

> The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.

See, *e.g.*, *Grieco* v. *Meachum*, 533 F.2d at 718 n.4; *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1038-1041 (2d Cir. 1984); *United States* v. *Dyer*, 722 F.2d 174, 177-178 (5th Cir. 1983). The same principle must apply in the context of the *Massiah* rule, which also is designed to protect the attorney-client relationship. It therefore would be inconsistent with the underpinnings of *Massiah*—indeed, a perversion of *Massiah*'s right to counsel rationale—to require the exclusion of evidence of a person's incriminating statements that were the product of a good faith investigation into his post-indictment

[21] The police also were concerned about Colson's own safety if respondent had discovered that he was cooperating with the police.

unlawful plans and activities. That is especially so here. The future crime with which the Belfast Police were concerned in this case—obstruction of justice—is one calculated to undermine the very integrity of the adversary process and the fairness of the trial that the Sixth Amendment rule announced in *Massiah* is intended to preserve. See 377 U.S. at 204, 206; see also *Nix* v. *Williams*, slip op. 13-14.[22]

In this case, the statements that were actually introduced at trial pertained largely to the theft offenses, not to the possible obstruction of justice that prompted the investigation. But as we have explained (see page 27, *supra*), application of the *Massiah* rule turns on the nature of the investigation, not the nature of the evidence it produces. Accordingly, the legitimacy of the State's recording of the December 26 meeting must be viewed from the position of the police prior to that meeting, when they arranged for Colson to record it. There seems little doubt that the police at that time had, as a result of respondent's own actions and statements, a "reasonable basis to suspect"[23] that respondent would discuss

[22] In *Beatty* v. *United States*, discussed in note 12, *supra*, evidence of threats made to the government's informant in order to deter him from testifying was introduced at trial along with other incriminatory statements. See 377 F.2d 181, 184 (5th Cir. 1967). Although the Fifth Circuit relied on that factor in distinguishing *Massiah* (377 F.2d at 190), the government in its brief in opposition in this Court did not make the argument, which has since been accepted by a number of courts of appeals (see pages 25-26, *supra*), that no Sixth Amendment violation occurs as a result of the admission of statements relating to obstruction of justice because there is no right to counsel in connection with such conduct. See Br. in Opp. 5-9. There also is no indication in *Beatty* that the government had reason to suspect prior to the meeting that the defendant would discuss or engage in obstruction of justice. The Court's summary reversal in *Beatty* therefore does not constitute a considered rejection of the argument in the text. In any event, for the reasons given in note 12, *supra*, *Beatty* should not be followed here.

[23] See *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d at 1039 (describing the showing necessary to invoke the crime-or-fraud exception to the attorney-client privilege). Similarly, in *Clark* v.

plans to harm prosecution witnesses and thereby obstruct justice in the pending prosecution. And as it turned out, respondent in fact did discuss such plans, as well the possibility of introducing false testimony at trial. Because the courts below found that this was one of the State's legitimate purposes for the investigation, and because there is no suggestion of pretext or bad faith, respondent's statements obtained as a result of that meeting could not properly be excluded on right to counsel grounds.

CONCLUSION

The judgment of the Supreme Judicial Court of Maine should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

KATHLEEN A. FELTON
Attorney

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United States, supra, the Court stated that "[t]o drive the privilege away, there must be 'something to give colour to the charge;' there must be '*prima facie* evidence that it has some foundation in fact.'" 289 U.S. at 15, quoting *O'Rourke* v. *Darbishire* [1920] A.C. 581, 604. See also *In re Sealed Case,* 676 F.2d 793, 814 n.84 (D.C. Cir. 1982). In light of past threats in this case, the State's concerns plainly had "some foundation in fact." See also *In re International Systems & Controls Corp.,* 693 F.2d 1235, 1242 & n.11 (5th Cir. 1982); *In re Sealed Case,* No. 84-5388 (D.C. Cir. Feb. 8, 1985), slip op. 7-8 & n.3.

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